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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

CLIFTON H. MEISINGER and OPHELIA MEISINGER,

Petitioners

v.

WILLIAM SCULLY and JANE A. SCULLY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

This petition is filed on behalf of Clifton H. Meisinger and Ophelia Meisinger for a writ of certiorari to review a judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the district court (App., *infra*, A), confirming the Report of Commissioners is not reported. The opinion of the court of appeals (App., *infra*, C), is reported at 409 F.2d 1061.

JURISDICTION

The judgment of the court of appeals was entered on March 28, 1969 (App., *infra*, D). A timely petition for rehearing was denied April 28, 1969 (App., *infra*, E).

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in federal condemnation proceedings to determine just compensation for property taken, a tenant is entitled to the actual market value of his leasehold interest for a fixed term even though that market value reflects a community recognition of the landlord's long-established custom of renewal of similar leases.

CONSTITUTIONAL PROVISION AND RULES INVOLVED

Constitution of the United States:

Amendment V:

> * * * nor shall any person * * * be deprived of * * * property, without due process of law; nor shall private property be taken for public use, without just compensation.

Federal Rules of Civil Procedure:

Rule 71A(h):

> * * * If a commission is appointed * * * its findings and report shall have the effect, and be dealt with by the court in accordance with the practice, prescribed in paragraph (2) of subdivision (e) of Rule 53. * * *

Rule 53(e) (II):

> In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. * * *

STATEMENT

On June 21, 1965, the United States filed a complaint in condemnation and a declaration of taking to take certain property, including 160 acres in fee (Tract 122), and a flowage easement of less than one acre (Tract 122E) out

of a 320-acre farm in Marion County, Kansas, for use in the Marion Dam & Reservoir Project. The farm was owned in fee by the respondents, William and Jane A. Scully, and leased by the petitioners, Clifton H. and Ophelia Meisinger. The improvements on the farm were owned by the tenants. (App., *infra*, C, p. 26). A dispute as to how the tenants' interest should be valued was resolved by the district court in its instructions to the commission appointed under Rule 71A(h), F.R.Civ.P., to determine just compensation. The landowners Scully objected to Instruction No. 13. (App., *infra*, C, p. 25).

The commission determined compensation for the entire taking and apportioned the award between the tenants and the landowners pursuant to the instructions, including No. 13 (App., *infra*, C, fn. 4). The landowners' objections to the commission's apportionment were overruled by the district court and its Judgment and Order Confirming Report of Commissioners and Order of Distribution was entered February 19, 1968 (App., *infra*, B). The landowners appealed. No objection was made by any of the parties to the aggregate amount awarded and the United States appeared in the court of appeals merely to request that the total award be approved and to indicate it had no interest in its division between the parties (App., *infra*, C, p. 24).

Instruction No. 13, as amended by the trial court in its order of March 29, 1966, reads as follows:

> In determining the value of the tenant's leasehold interest under the Scully lease, you are instructed that even though the lease by its provisions provides for a term of limited duration, the landlord and the tenants are presumed to have made the lease contract with reference to any established custom and usage which pertains to the subject of the contract and in this connection, you may consider the established methods and practices, if any, adopted and followed by the landlord and his predecessors in interest in their dealings with tenants over

> a long period of years. Such matters, if established by the preponderance of the evidence and shown to have been taken into account by the parties on purchase or sale of the leases, are proper matters to be considered in determining the value of such leasehold interests (App., *infra,* C, p. 25).
>
> It has been stipulated by Scully, the tenants and the Government that in any event, the tenants are to be compensated and paid for the value of their improvements in place.

After trial of the issue of just compensation, the Commission found as follows with respect to the above instruction (App., *infra,* C, p. 29):

> The Commission finds, under Instruction No. 13, that the evidence showed that there was in the community an established custom and usage whereby the Scully leases had a pecuniary value and were traded and sold in the community and recognized as having value over and above the value of the improvements. That, in any event, if such custom and usage does not override the terms of the one-year leases, it was clearly evident that the personal property of the tenant, which included all improvements upon the land of the landowner, had a greater value than similar improvements situated on land which was not leased as Scully land was leased.

The commission then determined compensation in the total amount of $58,172.00 (including $1,600.00 for mineral rights) and, in apportioning the award between landlord and tenant, it allowed $15,244.00 as the amount of damages due to the tenant, of which $7,872.00 was for diminution in the value of the leasehold interest and $7,372.00 was for improvements (App., *infra,* C, p. 26).

The landowners' appeal from the district court's judgment confirming the commission's report was stated to be on the ground that the lower court erred in giving Instruction No. 13 because they contended that the commission was instructed to consider extrinsic evidence and secondary

aids to construe and interpret an unambiguous written lease agreement between Scully and Meisinger.[1] Landowners also contended the tenants Meisinger had been in possession to the end of the lease period.[2] They requested the appellate court to reverse and restore to the landowners the $7,872.00 award for the tenants' leasehold interest and to sustain objections to Instruction No. 13.

The court below handed down its opinion March 28, 1969 (App., *infra,* C), in which it vacated "the part of the Judgment and Order of the district court adopting the commission's valuation of the lease and improvements and Order of Distribution" and remanded the matter with instructions to proceed in accordance with its opinion. Its judgment was entered on the same date (App., *infra,* D). Petition for rehearing was denied April 29, 1969 (App., *infra,* E), and a stay of its mandate was entered by the court of appeals on June 16, 1969, pending disposition of this petition.

The court below first concluded (App., *infra,* C, p. 27) that the clear and unambiguous term provided in the lease could not be lengthened by interpretation and that to do so would be tantamount to a judicial revision of the lease agreement. It then stated that the "lessee contends in the alternative, that even if his leasehold estate is viewed as a simple one year term, he is nevertheless entitled to recover the amount that would have been received had the lease been sold in the open market."[3]

---

[1] This was not a correct contention as to Instruction No. 13. That instruction was that such matters, on the conditions stated, "are proper matters to be considered in determining the value of such leasehold interests." (See p. 4 herein.)

[2] This contention of the landowners is not in issue here since the court below correctly recognized that title vested in the United States on June 21, 1965 (App., *infra,* C, p. 28, fn. 8). Thus, even if the tenant remained in possession [which petitioner denies], such occupancy would be under the United States and not under the respondent landlord.

[3] The appellate court is incorrect in stating this contention to be merely an alternative to a principal contention that the unambiguous

With respect to petitioners' contention that they should receive market value for the remaining lease term, the court below stated that this argument had been considered in *United States v. Petty Motor Co.*, 327 U.S. 372 (1946), "where the Supreme Court noted that 'the fact that some tenants had occupied their leaseholds by mutual consent for a long period of years does not add to their rights.' *Id.* at 380, n. 9." The court below then stated that this Court in *Petty* had quoted with approval and at some length from *Emery v. Boston Terminal Co.*, 59 N.E. 763 (Mass. 1901), "where Holmes, J., determined that the compensation to be paid for the condemnation of property held by a lessee could not include the value of an expectancy that the short term tenancy would be renewed." The court below went on to say "Just as in the case at bar, the owner's habit of renewing the lease prompted the lessee to assert a claim for the enhanced value of the leasehold. The Court[4] declared: 'Changeable intentions are not an interest in land, and although no doubt such intentions may have added practically to the value of the petitioners' holding, they could not be taken into account. . . . They added nothing to the tenants' legal rights, and legal rights are all that must be paid for. Even if such intentions added to the saleable value of the lease, the addition would represent a speculation on a chance, not a legal right.' *Id.* at 765. We conclude that the lessee of a one-year term is not entitled to recover the market value added by a mere expectation that the lease will be renewed. * * *"

---

terms of the lease could be altered by custom. The basic and primary contention of the tenants Meisinger has been at all times and *is* that, *regardless* of the legal limit of the term, it should be valued in this proceeding as it would actually have been valued in the market by a willing purchaser and willing seller.

[4]Since "The Court" has just been used to refer to the Supreme Court, the implication here is that the Supreme Court is speaking, when, as a matter of fact, it is the state court in *Emery*.

The court below thereupon proceeded to hold as follows:

> The district court's instruction to the commission [No. 13] was in error and the value of the leasehold must be reexamined within the framework of the existing total award which cannot now be disturbed. The commission should be instructed [in footnote 7, the court stated there would be no need to instruct a commission if on remand the district court "chooses to conduct the inquiry without the assistance of a commission"] that the "measure of damages is the difference between the value of the use and occupancy of the leasehold for the remainder of the tenant's term. . . . [and] the agreed rent which the tenant would pay for such use and occupancy." 372 [*sic*, should be 327] U.S. at 381.[5]

Having "acknowledged" that the value the commission placed upon the tenants' improvements seemed, to some extent, to have been affected by the "erroneous leasehold valuation," the court said that both the leasehold and the improvements should not be affected by the fact that the renewal expectancy value cannot be recovered in this suit" (App., *infra*, C, p. 29).

As hereinbefore stated, the court below then vacated the lease and improvements valuations and remanded to the district court.

Petitioners contend that the court below was in error in holding Instruction No. 13 to be wrong and in its conclusion that the lessee of a one-year term is not entitled to recover the market value added by an expectation that the lease will be renewed, when that expectation and the expectation that a sale and assignment of the lease would be approved by the lessor are actually reflected by transactions on the open market.

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[5]The agreed rent in this case had been paid by the tenant for the full term and there was, therefore, no reason to deduct it from the value of the occupancy.

The facts are not in dispute that, as the court below states: "The lessor, and his father before him, have owned and controlled a vast amount of farmland throughout the general area. Much of the land is leased to tenants such as appellee Meisinger who have occupied the same tract for many years. Despite the fact that all of the leasehold agreements provide for one year terms that cannot be assigned without the written consent of the lessor, a market for the Scully leases has developed. *This market development stems from the high fertility of the land, lenient rental provisions, and the practice of the lessor in routinely extending or renewing all leases even though they do not contain renewal provisions.*" [Emp. supp.] (App., *infra*, C, p. 24)

Nor is it disputed that petitioners Meisinger first acquired one-half of the present farm in 1936, later acquired a contiguous leasehold in 1948, and have operated both tracts as a unit since that time (fn. 2, opinion of the court below, App., *infra*, C, p. 24). The commission's report shows there were improvements on the leased land; that there was unrefuted testimony that Clifton H. Meisinger was the sole owner of all buildings, improvements, fences, etc. of every kind and description, for damage to which he was entitled to $7,372.00 (App., *infra*, C, p. 26) [which portion of the total award to the tenants was not objected to by respondents or contested by them in the court below]; and that under the provisions of the lease the tenant paid to the landowner a cash rental, plus taxes levied, year by year, upon the land, and paid taxes on his improvements direct to the county treasurer.

Both of the government appraisers stated that after inquiries as to sales of various Scully leaseholds in the vicinity, it was concluded that the average price paid was approximately 16% of the total value of the unimproved land in addition to the fair market value of the improvements. This is the method followed by the commission

(App., *infra*, C, p. 26), in arriving at the total damage to the leasehold interest.[6]

Petitioners further contend that on the record in this case, if this Court agrees that market value of the tenant's term is the proper criterion as a matter of law, then the commission's award and the judgment of the district court adopting its report were not clearly erroneous and should have been affirmed by the court below. Rules 53(e) II and 71A(h), F.R.Civ.P.; *United States v. Merz*, 376 U.S. 192, 198 (1964); *United States v. Certain Parcels of Land, etc.*, 384 F.2d 677, 679 (C.A. 4, 1967); *Uhlhorn v. U.S. Gypsum Co.*, 366 F.2d 211, 218 (C.A. 8, 1966); *Wilson v. United States*, 350 F.2d 901, 905 (C.A. 10, 1965).

What the commission actually found was the market value of the occupancy minus agreed rent [which it did not deduct since it had already been paid] plus severance damage to the remainder. It arrived at this result by finding the difference between the value of the lease prior to the taking and the value of the lease after the taking, an acceptable method long sanctioned by the courts, of arriving at the amount due for the part taken plus damage to the part not taken. *United States v. Virginia E. & P. Co.*, 365 U.S. 624, 632 (1961); *Olson v. United States*, 292 U.S. 246, 253 (1934).

The appellate court failed to provide in its formula for severance damage to the remainder, an item which all appraisers agreed was present, and which the *Petty Motor Co.* formula did not include, since it was not relevant in that case. Thus, the commission and the district court were correct, and the court below was in error, provided actual market value of the tenant's leasehold interest was the proper criterion of just compensation.

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[6] *i.e.*, 16% of $84,750.00 (or $13,560.00) minus 16% of $35,500.00 (or $5,688.00) to give a total damage of $7,872.00.

REASONS FOR GRANTING THE WRIT

I.

THE QUESTION INVOLVED IS IMPORTANT.

The monetary consideration involved in this controversy is relatively minor, but the principle followed by the court below will affect not only many other tenants holding under similar leases involved in the government's condemnation of land for Marion Dam & Reservoir in Kansas, but will also set a precedent in federal takings throughout the entire United States where leasehold interests are involved.

There are a great number of instances in all areas of the country, such as in the case of railroad leases in particular, and in many industrial areas, where the landlord grants only short-term leases but permits and encourages the building of costly improvements by the tenant under an implicit understanding and custom of renewal. Where such a custom is so generally recognized that tenants are willing to erect extensive improvements on the strength of their expectation of renewal, and the renewal expectancy is so widely accepted and acknowledged in the community as to lend an actual increased market value to a short-term lease, it is contended that the question of whether to allow that increased market value as part of just compensation is of the utmost importance.

II.

THE DECISION BELOW MISCONSTRUES A PRIOR HOLDING OF THIS COURT IN UNITED STATES v. PETTY MOTOR COMPANY AND IS IN CONFLICT WITH ANOTHER PRIOR DECISION OF THIS COURT AND WITH ANOTHER COURT OF APPEALS.

The decision below treats the holdings of this Court in *United States v. Petty Motor Company*, 327 U.S. 372 (1946), as if this Court had there specifically considered and rejected the contention that a tenant is entitled to receive the value of renewal expectancy if that value is actually reflected in fair market value. No such question

was at issue in that case and petitioners contend that the bare quotation in a footnote of language in a state case which clearly went beyond the holding in *Petty*, cannot constitute a holding or even approval by this Court. Petitioners further contend that if it *can* be so construed, the language of this Court in its prior decision should now be reconsidered and clarified.

The important question in *Petty* was whether the United States had, by its taking, destroyed or taken the whole term of the particular tenants, so as to distinguish the taking from *United States v. General Motors Co.*, 323 U.S. 373 (1945), where only part of the tenant's term was taken, and whether, under *General Motors*, the tenants in *Petty* were entitled to relocation costs. To answer these questions, it was necessary to determine exactly what legal rights each tenant had. It was in this sense that this Court stated in footnote 9, 327 U.S. at 380: "The fact that some tenants had occupied their leaseholds by mutual consent for long periods of years *does not add to their rights.*" [Emp. supp.] And it was for that statement that this Court cited *Emery v. Boston Terminal Co.*, 178 Mass. 172, 185 (1901), 59 N.E. 763, 86 Am. St. Rep. 473.

The statement in *Emery, supra*, that the lower Massachusetts court was right in excluding expert evidence as to an increase in value from that source [i.e., the lessor's habit of renewal], and that the addition of that "saleable value" would represent "a speculation on a chance,"[7] was not only superfluous to the holding in *Petty*, but was contrary to the statements in *Petty* by this Court as to market value, 327 U.S. at p. 377, and was also contrary, in effect, to the holding of this Court in *Montana Ry. Co. v. Warren*, 137 U.S. 348 (1890), 11 S.Ct. 96, that a mining claim which is "only a prospect" may have a value fairly denominated a market value since "such prospects are the constant

[7]The quotation of this portion of the *Emery* opinion by the court below gives the impression it was a declaration of this Court. It was instead a declaration of Holmes, J. in *Emery*.

subject of barter and sale." This Court there stated that "uncertain and speculative as it is, such prospect has market value; and the absence of certainty is not a matter of which the railroad company [condemnor] can take advantage * * *." [11 S.Ct. at p. 97][8]

The decision in the court below is also contrary to the many decisions of this Court, discussed *infra* under III hereof, that market value is what the condemnee is entitled to receive under the Fifth Amendment. Such exceptions to that rule as this Court may heretofore have specified are not pertinent here.

Furthermore, the court below is in conflict with the holding of the Second Circuit in *United States v. Certain Property, Borough of Manhattan*, 388 F.2d 596 (C.A. 2, 1968), which on a rehearing *en banc* held the panel majority was wrong in assuming that tenants under short-term leases will generally not be able to derive any value from their fixtures beyond the expiration of their leases, saying (pp. 601-602): "The contrary is proved not only by common experience but by the record of the frequent lease renewals in this very case. Lessors do desire, after all, to keep their properties leased, and an existing tenant usually has the inside track to a renewal for all kinds of reasons * * *. The condemnor is not entitled to the benefit of assumptions, contrary to common experience, that the fixtures would be removed at the expiration of the stated term."

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[8]And see *Mayor, etc. of Baltimore v. Rice*, 73 Md. 307 (1891), which petitioners contend is directly in point on the facts of this case. It is significant that the court in the *Mayor of Baltimore* case, in dealing with a short-term lease which, as here, had added market value due to renewal expectancy, affirmed an award based on such added market value and employed both language and reasoning remarkably similar to this Court's in the *Montana Ry. Co.* case, *supra*.

III.

THE DECISION BELOW VIOLATES THE FIFTH AMENDMENT TO THE CONSTITUTION IN THAT IT PREVENTS A TENANT FROM RECOVERING FAIR MARKET VALUE FOR HIS INTEREST.

This Court has insisted over and over again that the just compensation required to be paid under the Fifth Amendment when property is taken for a public use, is fair market value, or what a willing purchaser would pay in cash to a willing seller. *United States v. Petty Motor Co.*, 327 U.S. 372, 377 (1946); *United States v. Miller*, 317 U.S. 369, 374, 375 (1943); *United States v. Toronto Nav. Co.*, 338 U.S. 396, 402 (1949); *Kimball Laundry Co. v. United States*, 338 U.S. 1, 4-6 (1949).

This Court has also made it clear that it is only when there is no market or there are too few sales of similar property, that resort may be had to other means of arriving at value, and that even then the object is to find what a willing purchaser would have paid. *United States v. Toronto Nav. Co., supra*, p. 402; *United States v. Miller, supra*, p. 374.

The decision of the court below by denying the tenant, on apportionment of the award, a renewal expectancy value which was admittedly included in the fair market value of a short term "Scully lease," as shown by comparable sales of such leases, operates to deny him just compensation under the Fifth Amendment.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted.

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Attorneys for Clifton H. Meisinger and Ophelia Meisinger

July 1969

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,
Plaintiff,

vs.

1,856.24 ACRES OF LAND IN,
MARION COUNTY, KANSAS;
WILLIAM SCULLY, ET AL.;
AND UNKNOWN OWNERS,
Defendants.

Civil Action
No. T-3837
Tracts No.
122 and 122E

MEMORANDUM OF DECISION

This case was presented to the Court, following the filing by the Commission of its report, on "Plaintiff's Objections to Report of Commission" and "Objections by Defendant William Scully and Jane A. Scully to Report of Commission".

* * *

The Court has carefully examined the lengthy report of the Commission and finds it to be an excellent summary of the evidence introduced and supported by the record in the case.

The parties entered into several stipulations, they were unable to stipulate as to the breakdown of types of soil or as to the number of acres which were cropland, pasture and meadow, but did stipulate that the unencumbered remainder would be 158.80 acres. There was dispute as to the number of buildings on the property and the use being made of them.

The Commission viewed the property and heard evidence April 18, 19 and 20, 1967.

The testimony of defendant landowner's witnesses was carefully set forth in the report. Exhibits supplied to the Commission by appraisal witness contain elaborate break-

down of classification of soils and uses of the tracts involved both before and after the taking. Comparable sales are described in detail and an analysis of sales used by appraisal witnesses appears in evidence.

A summary of the testimony of defendant's witnesses as to the before and after value of the property taken is specifically set out as is the testimony of the plaintiff's witnesses carefully summarized. The testimony as set forth appears to be supported by the record and the exhibits received in the case. * * *

Based on this evidence and consideration of the exhibits containing sales data of comparables used by the witnesses, the Commission determined the before and after value of the property condemned to be as stated, $98,000 before and $35,310 after. The award was $56,572 plus $1,600 to which amount the landowner and the plaintiff had stipulated as being value of mineral rights.

It is obvious from the record in the case that market data approach was used. No other kind of evidence was offered. It further appears that when the Commission determined that the before value was $98,000 and the after value $35,310, that the finding was within the range of evidence. As was said in *Chandler vs. U.S.*, 372 F.2d 276, 280,

> "The Commission simply found itself in the same position as a Jury, when confronted with conflicting evidence, and was compelled to use its best judgment in arriving at an award within that range."

The Court might note, as did the Court of Appeals in *Chandler*, that some technical deficiency exists in the phraseology of the Commissioners' Report. As was observed in *U.S. v. Evans*, 380 F.2d 761, decided by 10th Cir. on July 14, 1967, the report states the value standard applied, the before and after values, the details as to types of land (soil), the use made of them and the values. These recitations together with the tabular material supplied show how the result was arrived at as a practical matter. There were no conflicting theories of value presented so no reason existed to state why

they should be considered or rejected. The path followed by the Commission is actually quite conspicuous. "There was no recitation of various theories which could be applied nor why they should or should not be rejected, but this is not required. The facts stated show the path and this is enough." 380 F.2d P. 765.

The *Merz* decision does not require meticulous compliance with every particular therein mentioned, but only suggests standards to assure fairness to both condemnor and condemnee. *Morgan v. U.S.*, 356 F.2d 17. *Merz* states that "we do not say that every contested issue raised on the record before the Commission must be resolved by a separate finding of fact. We do say that there must be an array of findings of subsidiary facts to demonstrate that the ultimate finding of value is soundly and legally based."

Under *Merz* and *Chandler* and *Evans* this Court must conclude that the general findings of the before and after value determined by the Commission in its report are supported by the record and there is no error in that determination affecting the substantial rights of the parties. * * *

William A. Scully and Jane A. Scully, the owners of the fee in the tract condemned, object to the allocation of any portion of the award of the Commission to their tenant. Counsel for the Scullys present a very convincing argument supported by respectable authority that sustain the landlord's views. The history and nature of the Scully landholdings have been the subject of legislature and judicial consideration by the legislature and the courts of Kansas for many years. This Court believes that the peculiar relationship of the Scullys and their tenants over a long period of years has established a situation in which the interest of the tenant amounts to something more than a base tenancy of one year duration as the Scullys now contend. The Commission made a fair summary of the evidence produced in the record. It will not be repeated here.

The interest of the tenant Messinger however it may be defined, is one that has been recognized by every party to

this litigation. To exclude him from participation in this award for that interest seems inconsistent with what is just, equitable and constitutional and the manner in which each have treated such interest in the past. As Justice Bradley said in *Boyd v. The United States*, 116 U.S. 616, 635:

> "Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be obsta principiis."

So here, a close construction of the law will deprive this tenant of a property right which has until now, been recognized as such by all the parties to this litigation. The Court recognizes its duty to be watchful of the rights of citizens when required to surrender their property for what has been determined to be the necessities for public use.

The objections to the Report of the Commission are considered and overruled. The Report of the Commission is adopted and approved by the Court. Judgment will be entered in conformity to the views herein expressed. Plaintiff's counsel will promptly prepare, circulate and submit to the Court an appropriate form of judgment.

DATED at Topeka, Kansas this 27th day of November, 1967.

/s/ George Templar
United States District Judge

APPENDIX B

JUDGMENT AND ORDER CONFIRMING REPORT OF COMMISSION AND ORDER OF DISTRIBUTION

NOW on this 19th day of February, 1968, this action comes on for hearing upon the oral motion of the Clifton H. Meisinger and Ophelia Meisinger, his wife, for a judgment and order adopting, ratifying and confirming the report of the Commission, filed herein on October 25, 1967. The Court, being fully advised in the premises, FINDS:

1. That this is a proceeding instituted by the United States of America, plaintiff, for the purpose of acquiring certain estates in lands designated as Tracts Nos. 122 and 122E, and more specifically set forth and described in the Complaint and Declaration of Taking filed herein.

2. That the use for which the property is taken is in connection with the Marion Dam and Reservoir, and it has been acquired by means of condemnation under judicial process in conformity and in compliance with the various provisions of the Acts of Congress set out in the Complaint. That the United States of America is empowered and has the right, pursuant to said Acts of Congress and upon the duly authorized actions of officers of the United States Government thereunder, as further set out in the Complaint, to acquire such estates in said land for public use by condemnation under judicial process.

3. That all parties interested directly or indirectly in said lands have been served with process as provided by law or have entered general appearances herein, and the said lands, together with all claimants and parties interested therein, are within the jurisdiction of this Court, which has power and authority to enter this judgment.

4. That on the 21st day of June, 1965, the estates taken in the above designated tracts vested in the United States of America, upon the filing of the Declaration of Taking and

the depositing therewith in the registry of this Court of the sum of $35,235.00, which sum was estimated by the acquiring agency to be the just compensation for the estates taken in said tracts.

5. That the owners of said tracts are William Scully and Jane A. Scully, his wife, and Clifton H. Meisinger and Ophelia Meisinger, his wife, who are jointly entitled to the entire amount awarded for the taking of said tracts.

6. That the report of the Commission filed herein awards to said defendant landowners as just compensation for the taking of said estates in their property the sum of $58,172.

7. That there is a deficiency of $22,937.00 between the amount deposited as estimated just compensation and the amount of said award, which deficiency should be paid by the plaintiff into the Court registry with interest thereon at the rate of six per cent per annum from December 31, 1965, until the date of deposit of said deficiency, except that $1,600.00 of the above total shall be without interest as stipulated between the plaintiff, the United States of America, and the defendant landowners, William Scully and Jane A. Scully, his wife, which sum is the total mineral value regarding Tract No. 122 and Tract No. 122E.

8. That it was agreed and stipulated between the plaintiff, the United States of America, and the defendant tenants, Clifton H. Meisinger and Ophelia Meisinger, his wife, that the sum of $80.00, which is the salvage value for certain improvements located on Tract No. 122, shall be deducted from any amount allowed by the Court in the way of an award of compensation for said tenants. Said stipulation was filed with the Court on October 13, 1966.

9. That of the original deposit of estimated just compensation the amount of $35,235.00 has been distributed by order of this Court, leaving no balance of the original deposit in the registry of this Court to be distributed by this order.

10. That an Order for Delivery of Possession was entered herein granting the plaintiff possession of said tracts as of the 31st day of December, 1965.

11. That none of the other defendants, known or unknown, named and designated in the Complaint, have any right, title or interest in and to or lien upon the real estate described in the above designated tracts, and are not entitled to any share of the just compensation awarded therefor.

12. That the objections of plaintiff and defendant landowners, William Scully and Jane A. Scully, his wife, to the Report of Commission were overruled by Order of the Court on November 27, 1967.

13. The Court directs the entry of final judgment as to Tracts 122 and 122E and under Rule 54 (b) finds and determines that there is no just reason for delay in entering such final judgment.

IT IS, THEREFORE, BY THE COURT ORDERED, ADJUDGED AND DECREED:

That the above and foregoing findings are hereby made a part of the judgment and order of the Court.

That the Report of the Commission filed herein on the 25th day of October, 1967, covering the tracts hereinbefore designated, be confirmed and approved in all respects; and that the Commission's findings of fact and conclusions of law are hereby adopted as the findings and conclusions of this Court, as stated in the Court's Memorandum of Decision filed November 27, 1967.

That on the 21st day of June, 1965, title to the extent of the estates acquired, as described in plaintiff's Complaint and Declaration of Taking, in the above designated tracts, vested in the plaintiff, the United States of America, free and discharged from all liens and claims whatsoever; and the right to just compensation for the property taken vested on the same date in the persons entitled thereto.

That all defendants, known or unknown, named and designated in the Complaint herein, other than those to

whom compensation is specifically awarded herein, are hereby forever barred and excluded from asserting any title, interest or estate in, lien upon or claim against the estates taken in said tracts.

That the total sum of $58,172.00 is hereby awarded as just compensation in full for the taking of said estates in the hereinbefore described land, all in accordance with the findings, conclusions and recommendations of the Commission filed herein and adopted by the Court.

That possession of said tracts is confirmed in plaintiff as of the 31st day of December, 1965.

That the plaintiff, the United States of America, pay forthwith into the registry of this Court the sum of $21,257.00 with interest at the rate of six per cent per annum thereon from the 31st day of December, 1965, the date of possession, until the date of deposit of said deficiency sum, and that $1,600.00 shall be paid into the registry of the Court without interest as stated above.

By stipulation between defendant landowners, William Scully and Jane A. Scully, his wife, and the defendant tenants, Clifton H. Meisinger and Ophelia Meisinger, his wife, the registry of the Court is directed to pay to the First National Bank in Wichita, Wichita, Kansas, Trustee, the sum so paid into Court.

IT IS BY THE COURT SO ORDERED.

/s/ GEORGE TEMPLAR
Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JANUARY, 1969, TERM

WILLIAM SCULLY and
JANE A. SCULLY,
Appellants,

vs. Number 10,144

UNITED STATES OF AMERICA,
CLIFTON H. MEISINGER
and OPHELIA MEISINGER,
Appellees.

**APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

Before HILL and HOLLOWAY, United States Circuit Judges, and BRATTON, United States District Judge

HILL, Circuit Judge.

In order to construct the Marion Dam and Reservoir the United States filed a declaration of taking under authority of 40 U.S.C. § 258a to condemn an area of land located within the District of Kansas. Included within the designated acreage was a 320-acre farm owned in fee by appellant Scully and leased to appellee Meisinger. Pursuant to Rule 71A(h), F. R. Civ. P., the district judge constituted a commission to determine the just compensation to be paid for the property. The commission conducted hearings, determined the sum to be awarded, and apportioned the total between the respective interests of the lessor and lessee. The district court approved the Report of the Commission and pursuant to

Rule 54(b), F. R. Civ. P., entered a final judgment as to the two tracts of land here concerned.

The lessor, William Scully, appeals from that part of the judgment apportioning the award between the landlord and tenant, contending that the commission was improperly instructed as to the factors to be considered in determining the value of the leasehold interest. Since the parties do not contest the propriety of the aggregate amount awarded, the United States appeared merely to request that the total award be approved and to indicate that it has no interest in the division of the award between the parties.[1]

The lessor, and his father before him, have owned and controlled a vast amount of farmland throughout the general area. Much of the land is leased to tenants such as appellee Meisinger who have occupied the same tract for many years. Despite the fact that all of the leasehold agreements provide for one year terms that cannot be assigned without the written consent of the lessor, a market for the Scully leases has developed. This market development stems from the high fertility of the land, lenient rental provisions, and the practice of the lessor in routinely extending or renewing all leases even though they do not contain renewal provisions. As a result of this unusual background, a dispute arose as to the proper value to be placed upon Meisinger's leasehold estate. He asserted that in view of the fact that he had occupied much the same land[2] from 1936 until the time of the filing of the declaration of taking on June 21, 1965, his leasehold should be valued as some-

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[1] In a condemnation proceeding "one award as just compensation for the entire value of the land is made and it stands in place of the property appropriated as the equivalent thereof. The distribution of the award between the owners of separate interests or estates is a matter wholly between them and the public is not concerned therewith." *Bogart v. United States*, 169 F.2d 210, 213 (10th Cir. 1948).

[2] Meisinger, as lesee, first acquired one-half of the present farm in 1936. Later, in 1948, he acquired a contiguous leasehold and has operated the two tracts as a unit since that time.

thing more than a mere one year term.[3] The lessor resisted, contending that the tenant's rights should be governed by the terms of the written lease agreement. The district court rejected this contention by advising the commission, in instruction number 13, that:

> "In determining the value of the tenant's leasehold interest under the Scully lease, you are instructed that even though the lease by its provisions provides for a term of limited duration, the landlord and the tenants are presumed to have made the lease contract with reference to any established custom and usage which pertains to the subject of the contract and in this connection, you may consider the established methods and practices, if any, adopted and followed by the landlord and his predecessors in interest in their dealings with tenants over a long period of years. Such matters, if established by the preponderance of the evidence and shown to have been taken into account by the parties on purchase or sale of the leases, are proper matters to be considered in determining the value of such leasehold interests."

Following that instruction, the commission received evidence as to the market value of comparable sales of Scully leases, and assigned $7,872 as the compensable value of the appropriated portion of the leasehold.[4]

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[3] It is undisputed that the lessee has occupied the land under a succession of agreements not unlike the one in effect when the condemnation occurred. This last lease was executed in November, 1964, and provided "for a term of one year commencing March 1, 1965, and ending the last day of February, 1966." The lease made no mention of the right of renewal although some of the previous contracts did indicate that "nothing contained in this lease shall be construed to create a tenancy longer than the one year term herein specified."

[4] The commission made the following findings:

Value of unimproved land before taking	$84,750
Value of land remaining after taking	35,550
Value of land taken (including severance damage)	$49,200

[Continued]

Although a determination of the type and extent of the property interests taken upon an exercise of the federal power of eminent domain is governed by federal law, the courts will normally look to the law of the state where the property is located in order to ascertain the relative rights of a lessor and lessee.[5] The lessee thus points to *Berg v. Scully*, 245 P. 119 (Kan. 1926) as authority for the proposition that the practical construction placed upon the lease by the parties becomes "a part of it to the same extent as though written therein." *Id.* at 120. The court in Berg was confronted with an entirely different situation than is presented here. There the question concerned the right of a lessee to recover for improvements placed upon leased property. In deciding in favor of the lessee the court went outside the written lease to ascertain the intent of the parties. It was then concluded that the lessor's duty to cooperate with the lessee "was within the fair interpretation of the contract—certainly as against a demurrer to the petition. . . ." *Id.* at 122. It is abundantly clear that to

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[4] [Continued]

Value of improvements before taking		$13,250
Value of damage to those taken		3,750
Value of damage to those remaining		3,622
	Total damage	$ 7,372
Value of lease before taking		$13,560
Value after taking		5,688
	Total damage	$ 7,872
Total award to lessee		$15,244
Total award to lessor		41,328
	Total award	$56,572

An explanation for the separate valuation of the improvements is found in the fact that the lease expressly provided that all improvements on the land belonged to the lessee and constituted his separate personal property.

[5] Cf. United States ex rel. *Tennessee Valley Authority v. Powelson*, 319 U.S. 266, 279 (1943); *United States v. Causby*, 328 U.S. 256, 266 (1946); *United States v. Certain Property*, 306 F.2d 439, 444 (2d Cir. 1962); *Adaman Mutual Water Co. v. United States*, 278 F.2d 842, 847 n. 4 (9th Cir. 1960).

read a right of renewal into the present lease would not be a fair interpretation, even in view of an understandable sympathy for the lessee in this context. It is one thing to rely upon custom and usage to clarify incidental problems of lease interpretation, but it is quite another to extend the term or duration of the tenancy through such dubious means. Aside from the obstacle presented by the Statute of Frauds, it is necessary to reflect upon the additional confusion that would be created if all leasehold estates were extended in the face of explicit language to the contrary. The effects of such a policy upon the stability of leasing arrangements is obvious. There is little wonder that the lessee has been unable to cite even one instance in which a court has so held. The present lease provides "for a term of one year commencing March 1, 1965, and ending the last day of February, 1966." To say that it is a fair interpretation to lengthen the clear and unambiguous term provided in the lease, would be tantamount to a judicial revision of the lease agreement and cannot be condoned.[6]

The lessee contends in the alternative, that even if his leasehold estate is viewed as a simple one year term, he is nevertheless entitled to recover the amount that would have been received had the lease been sold in the open market. Essentially, the argument is that the likelihood of renewal added to the value of the lease; the Government's obligation in fixing a just compensation is measured in terms of market value; the renewal expectancy is reflected in the fair market value and therefore must be recoverable. This argument has been considered in *United States v. Petty Motor Co.*, 327 U.S. 372 (1946), where the Supreme Court noted that "the fact that some tenants had occupied their leaseholds by mutual consent for long period of years does not add to their rights." *Id.* at 380 n. 9. The Court quoted with

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[6] "In construing a contract, the duty of the court is to determine what the contract is and not to make a new one for the parties." *Filtrol Corp. v. Loose*, 209 F.2d 10, 12 (10th Cir. 1953); *Frankfort Oil Co. v. Snakard*, 279 F.2d 436, 444 (10th Cir. 1960).

approval, and at some length, from *Emery v. Boston Terminal Co.*, 59 N.E. 763 (Mass. 1901), where Holmes, J., determined that the compensation to be paid for the condemnation of property held by a lessee could not include the value of an expectancy that the short term tenancy would be renewed. Just as in the case at bar, the owner's habit of renewing the lease prompted the lessee to assert a claim for the enhanced value of the leasehold. The Court declared: "Changeable intentions are not an interest in land, and although no doubt such intentions may have added practically to the value of the petitioners' holding, they could not be taken into account. . . . They added nothing to the tenants' legal rights, and legal rights are all that must be paid for. Even if such intentions added to the saleable value of the lease, the addition would represent a speculation on a chance, not a legal right." *Id.* at 765. We conclude that the lessee of a one year term is not entitled to recover the market value added by a mere expectation that the lease will be renewed. 4 Nichols, The Law of Eminent Domain para. 5.23[4] p. 71 (1963).

The district court's instruction to the commission was in error and the value of the leasehold must be reexamined within the framework of the existing total award which cannot now be disturbed. The commission should be instructed[7] that the "measure of damages is the difference between the value of the use and occupancy of the leasehold for the remainder of the tenant's term . . . [and] the agreed rent which the tenant would pay for such use and occupancy." 372 U.S. at 381. By the remainder or unexpired portion of the lease is meant that period from the date of taking to the expiration of the term.[8] In this case, from June 21, 1965, through the last day of February, 1966.

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[7]There will, of course, be no need to instruct a commission if upon remand the district court chooses to conduct the inquiry without the assistance of a commission.

[8]The date of taking under the Delcaration of Taking Act, 40 U.S.C. § 258a, is the date of the filing of the declaration of taking

[Continued]

We must also acknowledge that the value the commission placed upon the tenant's improvements seems, to some extent, to have been affected by the erroneous leasehold valuation.[9] It appears from the record of the commission's proceedings, that the buildings and other improvements contributed by the lessee were valued after an analysis was made of comparable sales of Scully leases. The total sales price paid for other leaseholds was then apportioned into an amount estimated to have been the sum paid for improvements, with the remainder being attributed to the leasehold itself. This does not mean, as is urged by the lessee, that the full amount of the comparable sales prices should now be taken to have been paid for the improvements only. The purchasers undoubtedly paid for the renewal expectancy which had a practical, if not a legal value. Thus, the true value of the improvements should not be affected by the fact that the renewal expectancy value cannot be recovered in this suit.[10] Nevertheless, to avoid even the possibility that the misconceived leasehold evaluation may have contributed to an improper appraisal of the worth of the improvements, both the leasehold and the improvements should be reevaluated.

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even though the actual physical ouster occurs thereafter. *United States v. Dow*, 357 U.S. 17, 23 (1958); *United States v. Sowards*, 370 F.2d 87 (10th Cir. 1966); *Travis v. United States*, 287 F.2d 916 (Ct. Cl. 1961). See Annot., 36 A.L.R. 2d 337 at 447-462 (1954).

[9] "The Commission finds, under Instruction No. 13, that the evidence showed that there was in the community an established custom and usage whereby the Scully leases had a pecuniary value and were traded and sold in the community and recognized as having value over and above the value of the improvements. That, in any event, if such custom and usage does not override the terms of the one-year leases, it was clearly evident that the personal property of the tenant, which included all improvements upon the land of the landowner, had a greater value than similar improvements situated on land which was not leased as Scully land was leased."

[10] For a discussion of the problems involved in appraising improvements for condemnation purposes, see Annot., 3 A.L.R. 2d 286 at 299 (1949), and Annot., 1 A.L.R. 2d 878 (1948).

The part of the Judgment and Order of the district court adopting the Commission's valuation of the lease and improvements and Order of Distribution are therefore VACATED and the matter is REMANDED with instructions to proceed in accordance with this opinion.

APPENDIX D

MARCH TERM, MARCH 28th, 1969

Before Honorable Delmas C. Hill and Honorable William J. Holloway, Jr., Circuit Judges, and Honorable Howard C. Bratton, District Judge.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Kansas and was argued by counsel.

On consideration whereof, it is ordered that the part of the Judgment and Order of the district court adopting the Commission's valuation of the lease and improvements and Order of Distribution are vacated and the cause is remanded with instruetions to proceed in accordance with the opinion of this court.

WILLIAM L. WHITTAKER
Clerk

By GLADYS E. HOBBS
Deputy Clerk

APPENDIX E

MARCH TERM, APRIL 29th, 1969

Court met this day at Denver, Colorado, at the hour of nine-thirty o'clock a.m. pursuant to adjournment.

Before Honorable Delmas C. Hill and Honorable William J. Holloway, Jr., Circuit Judges, and Honorable Howard C. Bratton, District Judge.

On consideration of the petition for rehearing, it is ordered that the petition be and is hereby denied.

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 396

CLIFTON H. MEISINGER AND OPHELIA MEISINGER,
PETITIONERS

v.

WILLIAM SCULLY AND JANE A. SCULLY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

This case involves the distribution of an award in a condemnation proceeding between the owner of a farm and his tenant. The owner, William Scully, had extensive land holdings in the area which were leased on an annual basis to numerous tenants. The tenants owned all improvements, including houses, barns, fences, etc. Customarily the leases were renewed year after year, even though the tenants had no legal right of renewal. There was testimony at the trial that, because of this custom of renewal, the so-called "Scully leases" had a market value greater than the value of the one-year

term and the improvements owned by the tenants. On the basis of this testimony and instructions from the district court, the commission appointed under Rule 71A, F.R. Civ. P., found that the value of the entire estate taken was $56,572, of which the tenant was entitled to $15,244. The tenant's award was composed of $7,372 for damages to the improvements and $7,872 for damages to the leasehold over and above the value of the improvements. This award was accepted by the district court.

The landowner appealed to the Tenth Circuit on the complaint that the $7,872 damages to the leasehold were based on an interest greater than merely the one-year term of the lease. The court of appeals agreed and reversed, holding that the custom of renewing Scully leases over an extended number of years could not create a legal interest in the lessee beyond the one-year term in the face of the explicit language in the lease to the contrary. The court of appeals also rejected, on the authority of *United States* v. *Petty Motor Co.*, 327 U.S. 372, the alternative contention that, even viewed as a one-year lease, "the Government's obligation in fixing a just compensation is measured in terms of market value; the renewal expectancy is reflected in the fair market value and therefore must be recoverable" (Pet. 27).

Since neither party questioned the overall award of $56,572, the government, on appeal to the Tenth Circuit, appeared solely to request that the total award

be approved and to indicate that it had no interest in the question of distribution between landlord and tenant. See *United States* v. *Dunnington,* 146 U.S. 338, 353. On this petition for a writ of certiorari by the tenant, the government continues to have no interest in the matter insofar as it is purely a question of distribution. However, petitioners' apparent contention (*e.g.,* Point III, p. 13), that the Fifth Amendment requires an increased award to them, might well result in increased payments by the United States if the lessor is at the same time held to be entitled to its full interest in the property, *i.e.,* fee title less a short-term outstanding lease.

Specifically, we believe the Tenth Circuit has correctly applied the rule of *United States* v. *Petty Motor Co.,* 327 U.S. 372, 380, n.9, to the effect that "The fact that some tenants had occupied their leaseholds by mutual consent for long periods of years does not add to their rights." Accordingly, we disagree with the second reason petitioners give for granting the writ of certiorari, *viz.,* that the opinion below is in conflict with this Court's holding in *Petty Motor Co.* In our view, the Tenth Circuit's opinion correctly reiterates the existing rule that "'the 'measure of damage is the difference between the value of the use and occupancy of the leasehold for the remainder of the tenant's term * * * [and] the agreed rent which the tenant would pay for such use and occupancy.' 327 U.S. at 381." (Pet. 27–28.)

For the foregoing reasons, it is respectfully submitted that the petition for certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

SHIRO KASHIWA,
Assistant Attorney General.

ROGER P. MARQUIS,
A. DONALD MILEUR,
Attorneys.

AUGUST 1969.

U.S. GOVERNMENT PRINTING OFFICE: 1969